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PELABUHAN TANJUNG PELEPAS SDN BHD v. INDUSTRIAL COURT, MALAYSIA & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
AWANG ARMADAJAYA AWANG MAHMUD JC
[CIVIL SUIT NO: JA-25-27-04-2019]
B 27 JANUARY 2020

ADMINISTRATIVE LAW: *Judicial review – Application for – Application to quash award of Industrial Court – Whether Industrial Court erred in deciding dismissal of employee without just cause and excuse – Whether company may* C *terminate employee notwithstanding finding of not guilty by domestic inquiry – Whether audi partem rule applicable in termination of employment agreement without any termination benefit – Whether employer failed to comply with s. 14 of Employment Act 1955 – Whether application allowed – Rules of Court 2012, O. 53*

D

LABOUR LAW: *Employment – Dismissal – Whether with just cause and excuse _ Whether company may terminate employee notwithstanding finding of not guilty by domestic inquiry – Whether Audi Partem Rule applicable in termination of employment agreement without any termination benefit – Whether employer failed to comply with s. 14 of Employment Act 1955*

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This was an application for judicial review pursuant to O. 53 Rules of Court 2012 to quash the award handed down by the first respondent in deciding that the dismissal of the second respondent was without just cause and excuse. The second respondent was holding the position of a supervisor in the mobile equipment section in the maintenance and technical service department with F the company ('applicant'). The applicant issued a domestic inquiry notice to the second respondent. At the domestic inquiry, the second respondent was given the opportunity to produce evidence and witness to defend himself from the charges levelled against him. The domestic inquiry found the second respondent not guilty of the charges. Notwithstanding the findings of G the domestic inquiry, the management found the second respondent had lost the necessary trust and confidence to continue in the employment. The applicant was of the opinion that it had no alternative but to terminate the second respondent's services. The Industrial Court was of the opinion that the applicant had failed to produce any evidence to prove, on a balance of H probabilities, the charge framed against the second respondent and found that the second respondent's dismissal was without just cause and excuse. The issues that arose in this application were (i) whether a company may terminate an employee notwithstanding he was found not guilty by the domestic inquiry; (ii) whether the *audi partem* rule is applicable in the I termination of an employment agreement without any termination benefit; and (iii) whether an employee is guilty of an act which he opposed.

Held (dismissing application with costs):

(1) An employee accused of misconduct gets his day in 'court' *via* a domestic inquiry, whereby the employer has to prove the charges and the worker gets to defend himself. If there is no misconduct, then the employee must be restored to his former position and paid any income due and this was for the entire period when he was deprived part of the whole of his lawful income. If the management refused to accept the findings of the domestic inquiry set up by the management itself, it was in clear violation of s. 14 of the Employment Act 1955 ('Employment Act') for finding the guilt of misconduct or otherwise was vested in the domestic inquiry, the moment it was formed and held. If the domestic inquiry found the employee not guilty and hence there was no misconduct, he may not be terminated by way of the said s. 14. The management could not substitute its own opinion in place of the facts that were found by the domestic inquiry. (para 63, 64, 73 & 75)

(2) A procedural 'due inquiry' but later disregarded in the decision of the management was not 'due inquiry' at all. It is a kangaroo procedure worthy of a kangaroo court. It is malicious in its intent and makes a mockery of '*audi alteram partem*.' If the defence put up by an employee had been accepted by the domestic inquiry, but disregarded by the management, then there should not be a domestic inquiry and s. 14 Employment Act had been defeated by injustice and became devoid of meaning. (paras 58 & 69)

(3) It was undisputed that the second respondent had done his job and had merely followed the instructions of his superior and that he was not involved in issues pertaining to the payment to a contractor. In fact, the second respondent had opposed the purchase order. In all the reports/ progress worksheets, the second respondent clearly wrote 'wiring system job not complete under by the contractor.' It was for the management of the company to do theirs. How the second respondent could be punished when he was clearly about not supporting the payment to the contractor was repulsive to say the least. It was the payment department that had failed to do its duty. (paras 78, 79, 81 & 84)

(4) The applicant had failed to comply with s. 14 of the Employment Act when it invoked the provision in dismissing the second respondent. The second respondent was not guilty of breaking any rules. The Chairman of the Industrial Court also agreed with the decision of the domestic inquiry and there was thus no reason to depart from her views. (paras 86 & 87)

Case(s) referred to:
Malloch v. Aberdeen Corporation [1971] 1 WLR 1578 ***(refd)***
Nakkuda Ali v. Jayaratne [1951] AC 66 ***(refd)***
R v. BBC, Ex Parte Lavelle [1982] 1 RLR 404 ***(refd)***
Ridge v. Baldwin [1964] AC 40 ***(refd)***
Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd [1997] 1 CLJ 646 SC ***(refd)***
Tinsley v. Milligan [1993] 3 WLR 126 ***(refd)***
University Council Of Vidyodaya University Of Ceylon v. Silva [1965] 1 WLR 77 ***(refd)***

Legislation referred to:
Employment Act 1955, s. 14(1)
Government Proceedings Act 1956, s. 29
Rules of Court 2012, O. 53 rr. 1(1), (2), 2(1), (2), (3), (4), 3(1), (2), (3), (4), (5), (6), 4(2), 5(1)(a)
Specific Relief Act 1950, s. 54

Municipal Corporations Act 1882 [UK], s. 191(4)

Other source(s) referred to:
MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edn, pp 625-626

For the applicant - Sharifullah Majeed & Nurul Aisyah Hassan; M/s Lee Hishamuddin Allen & Gledhill
For the respondent - Abd Rahim Ali; M/s Rahim, Aidil & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Awang Armadajaya Awang Mahmud JC:

Introduction

[1] This is an application for judicial review (encl. 1) pursuant to O. 53 of the Rules of Court to quash the Award No. 207 of 2019 dated 14 January 2019 handed down by the first respondent. The first respondent then awarded the second respondent with RM121,261.60.

[2] The basis of the award was that the dismissal of the second respondent by the applicant was without just cause or excuse.

The Cause Papers

[3] The cause papers in this application are as follows:

(i) *ex parte* leave for judicial review application dated 4 April 2019 ("leave application");

(ii) the applicant's affidavit-in-support affirmed by Jaizal Kamar bin Jalaludin on 4 April 2019 ("applicant's affidavit-in-support");

(iii) second respondent's affidavit-in-reply affirmed by Norisam bin Yunos on 27 August 2019 ("second respondent's affidavit-in-reply"); and

(iv) The applicant's affidavit-in-reply affirmed by Jaizal Kamar bin Jalaludin on 10 September 2019 ("applicant's affidavit-in-reply"). A

The Law In Respect Of Judicial Review

[4] Judicial review is provided for under O. 53 Rules of Court 2012.

[5] Historically, the basis for judicial review of acts and decisions of public authorities has been the doctrine of *ultra vires* of excess of jurisdiction. The role of the court is to keep bodies within their allocated authority of jurisdiction. In judicial review, the court is concerned with the decision-making process and not with the merits of the decision. Over the years, the scope of judicial review has expanded to include "patent error of law", "natural justice", and the rules of *locus* have liberalised (paraphrased from MP Jain, *Administrative Law of Malaysia and Singapore,* 3rd edn pp. 625-626). B C

Scope Of The Order

[6] This order govern all application seeking the prerogative writs of *mandamus*, prohibition, *quo warranto*, *certiorari* or 'any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose', but is subject to the provisions of Chapter VII of Part 2 of the Specific Relief Act 1950 (on the enforcement of public duties). (O. 53 r. 1(1) and r. 1(2)) D E

Mode Of Application

[7] All application for judicial review (other than for an order of *habeas corpus*) shall be in Form 109 (O. 53 r. 2(1))

[8] An application may be made for any of the reliefs, including declaration, either jointly or in the alternative provided the reliefs are connected with the same subject matter. (O. 53 r. 2(2)) F

[9] A court is not confined to the relief claimed but may make any order including an order of injunction or monetary compensation.

[10] An injunction against the government must be in accordance with s. 29 of the Government Proceedings Act 1956 and s. 54 of the Specific Relief Act 1950. (O. 53 r. 2(3)) G

Locus Standi

[11] Any person who is adversely affected by the decision of any public authority shall be entitled to make the application. (O. 53 r. 2(4)) H

[12] Leave is required to make an application for judicial review. An application for judicial review shall not be made without leave of court first being obtained. (O. 53 r. 3(1)) I

Application For Leave

[13] Application for leave is made *ex parte* to a judge in chambers, supported by a statement 'setting out the name and description of the applicant, the relief sought and the grounds on which it is sought', and by affidavits verifying the facts relied on. (O. 53 r. 3(2))

[14] Notice of the application for leave must be given to the Attorney General's Chambers not later than three days before the hearing date together with copies of the statement and affidavits. (O. 53 r. 3(3))

[15] In granting leave, the judge may impose terms as to costs and to the giving of security. (O. 53 r. 3(4))

[16] No grant of leave shall operate as a stay of proceedings, unless the judge otherwise so directs. (O. 53 r. 3(5))

Time For Application

[17] An application for judicial review shall be made 'promptly' and in any event 'within three months' from the date when the grounds of application first arose or when the decision is first communicated to the applicant. (O. 53 r. 3(6))

Notice In Form 110

[18] A sealed copy of Form 110 together with a copy of the statement and all affidavits shall be served on all persons directly affected by the application not later than 14 days before the hearing specified in the Form 110. (O. 53 r. 4(2))

Award Of Damages

[19] Damages may be awarded to the applicant if:

(i) the applicant has included in the statement in support of the application for leave, a claim for damages arising from the subject to which the application relates; and

(ii) the court is satisfied that if the claim has been made in an action begun by the applicant, at the time of making his application, he could have been awarded damages. (O. 53 r. 5(1)(a))

The Background Facts

[20] The applicant is a company which manages and controls container terminals that carry out work to fix and load containers to and from vessels for the purpose of export, import and to transport foreign vessels from overseas.

[21] The second respondent commenced his employment with the applicant *vide* letter dated 3 August 2000 and became effective on 6 September 2000 as a technician with a salary of RM1,000. The second

respondent's last held position in the applicant company was as a supervisor in the mobile equipment section in the maintenance and technical service department with a last drawn salary of RM3,697.

[22] The second respondent was suspended *vide* a letter dated 23 May 2016, to allow the applicant to investigate the reports relating to certain irregularities involving the second respondent as a supervisor in the mobile equipment section in the maintenance and technical service department.

[23] The second respondent was issued a show cause letter dated 8 June 2016 and was instructed to provide his explanation as to why disciplinary action should not be taken against him in relation to the following charges:

> 1. Bahawa anda telah didapati memberi arahan kepada Mohd Shahril bin Abdul Fatah (No. Staf 1871) dan A. Aziz bin Gani (No. Staf 4440), Juruteknik daripada Forklift & Tyre Unit, Mobile Equipment Section untuk melakukan kerja membaik pulih 11 Prime Mover secara berperingkat di mana kerja-kerja tersebut bukanlah di bawah skop kerja (job scope) Juruteknik di atas.
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> 2. Bahawa anda telah didapati member arahan kepada Mohd Shahril bin Abdul Fatah (No. Staf 1871) dan A.Aziz bin Gani (No. Staf 4440), Juruteknik daripada Forklift & Tyre Unit, Mobile Equipment Section untuk melakukan kerja membaik pulih 11 Prime Mover P208 dan P390 di mana kerja-kerja baik pulih ini sepatutnya dilakukan oleh kontraktor Global Port Engineering & Services Sdn Bhd dan JB Seng Batteries Sdn Bhd.
>
> (Translation)
>
> 1. That you have been found to give instructions to Mr Mohd Shahril bin Abdul Fatah (Staff number: 1871) and Mr A. Aziz bin Gani (Staff Number 4440), Technicians from Forklift & Tyre Unit, Mobile Equipment Section to do repair works on 11 Prime Mover by stages whereas the jobs done were not within the job scope of the above named technicians
>
> 2. That you have been found to give instructions to Mr Mohd Shahril bin Abdul Fatah (Staff number: 1871) and Mr A. Aziz bin Gani (Staff Number 4440), Technicians from Forklift & Tyre Unit, Mobile Equipment Section to do repair works on 11 Prime Mover P208 and P390 whereas these repair works should have been done by the contractor from Global Port Engineering & Services Sdn Bhd and JB Seng Batteries Sdn Bhd.

[24] The second respondent provided his explanation *vide* letter dated 13 June 2016 to the two charges levelled against him by the applicant. Upon deliberation of the second respondent's explanation, the applicant did not find his explanations satisfactory nor was it acceptable. Accordingly, the applicant issued a domestic inquiry notice dated 17 August 2016 in order for the latter to justify and defend himself against the charges levelled on him as stated above during the domestic inquiry scheduled on 2 September 2016 in an attempt to comply with the rules of natural justice and procedural fairness.

[25] The applicant informed the second respondent *vide* a letter dated 8 September 2016, that the domestic inquiry will continue on 9 September 2016 where he was required to respond to the following charges levelled against him:

Bahawa anda telah dapati mengesahkan kerja-kerja membaik pulih PM380 di dalam "Breakdown Worksheet" yang telah dibuat oleh Mohd Shahril bin Abdul Fateh (No. Staf 1871) dan/atau A Aziz bin Gani (No. Staf 4440) pada tarikh-tarikh berikut:

(Translation)

That you have been found to verify the repair works of PM380 in the "Breakdown Worksheet" prepared by Mr Mohd Shahril bin Abdul Fatah (Staff number: 1871) and Mr A. Aziz bin Gani (Staff Number 4440) on the following dates

No	Tarikh/Date	No	Tarikh/ Date
1	5 September 2015	16	13 Oktober 2015
2	7 September 2015	17	14 Oktober 2015
	9 September 2015	18	15 Oktober 2015
	11 September 2015	19	16 Oktober 2015
	14 September 2015	20	18 Oktober 2015
	15 September 2015	21	21 Oktober 2015
	17 September 2015	22	22 Oktober 2015
	28 September 2015	23	3 November 2015
	29 September 2015	24	4 November 2015
	30 September 2015	25	5 November 2015
	5 Oktober 2015	26	11 November 2015
	6 Oktober 2015	27	12 November 2015
	7 Oktober 2015	28	13 November 2015
	8 Oktober 2015	29	14 November 2015
	12 Oktober 2015		

Walaupun dalam pengetahuan anda, kerja-kerja baikpulih ini sepatutnya dilakukan oleh kontraktor JB Seng Batteries & Motors Sdn. Bhd. Berdasarkan invois tuntutan bayaran bernombor 96448 bertarikh 4 Disember 2015 berjumlah RM10,070.

(Translation)

Although it is within your knowledge that the said repair works should have been done by the contractor from JB Seng Batteries & Motors Sdn Bhd based on the Payment Claim Invoice No. 96448 dated 4 December 2015 amounting to RM10,070.

[26] At the domestic inquiry, the second respondent was given the opportunity to produce evidence and witness to defend himself from the charges levelled against him. The domestic inquiry found the second respondent not guilty of the charges.

[27] Notwithstanding the findings of the domestic inquiry, the management found the second respondent has lost the necessary trust and confidence to continue in the employment.

[28] In the circumstances, the applicant is of the opinion that it had no alternative but to terminate the second respondent's services *vide* the termination letter dated 28 December 2016 and was informed that he may appeal against the applicant's decision within 14 days from the date of his dismissal.

[29] The second respondent communicated his appeal against the applicant's decision *vide* letter dated 12 January 2017, to terminate him. After the purported due consideration, the applicant informed the second respondent *vide* a letter dated 31 January 2017 that his appeal had been rejected.

The Findings Of The Industrial Court Chairman

[30] The first respondent made several findings with regard to the dismissal of the second respondent. The gravamen of the findings of the first respondent is captured in the learned Chairlady's conclusion as follows:

> Evaluation and Findings
>
> [44] In view of para 38(i) above, the court has a duty to consider whether the Claimant is guilty of the allegation of misconduct levelled against him by the Company.
>
> Charge No: 1
>
> [45] Based on the notice of DI dated 17/8/2016 issued by the Company to the Claimant, the charge against the Claimant as per shown in paragraph 4 hereinabove. Here it is basically stated that he had confirmed the work done on the PM380 by both COW-2 and Aziz despite knowing that the reviving job is to be carried out by the contractor. Based on the evidence work done by COW-2 and Aziz on the PM380 by signing on their job cards.
>
> [46] *In fact, the Claimant also did not deny that there was work pending by the contractor on the PM380 but had eventually requested for the cancellation of the PO in order for both COW-2 and Aziz to complete the work on the PM380. In relation to the cancellation of the PO, there was no evidence produced at the hearing to show that the Claimant had not done all that he could do to ensure that the PO was cancelled.* On the contrary, at the DI, the Claimant had stated the following with regard to the PO when he was questioning COW-2 who was referred as "W2" at the DI:

[47] COW-1 had during cross-examination confirmed that the Claimant had taken over the work on the PM380 from his immediate superior, Nor Adly Buang. This information was also reflected in the notes of the DI. *At the DI, Nor Adly Buang was referred as "W3" and according to him, he was the one who had been instructed to supervise the work of the PM380 using the same two (2) technicians i.e. COW-1 and Aziz.* The Claimant had subsequently been asked to take over from W3 due to non-performance by the W3.

[48] *Through this evidence by W3, it also corresponds to the Claimant's evidence that he was merely following instructions from his superior, En Choi Kam Loon* and that he was not involved in issues pertaining to the payment to the contractor. In W3's evidence, it was also mentioned that the reason why the Stackers Unit was given the task to revive the PM380 was mainly because it has multi skilled workers in that unit. The parts of W3's evidence at the DI is shown below:

[49] COW-2 had during cross-examination stated that the contractor was not a part of what he and Aziz had to do on the PM380 but in order for them to proceed and get the PM380 started, the harness wire issue had to be completed first. This was what was written by COW-2 and Aziz in the job sheet/card. *This was also the reason why he had suggested to cancel the PO so that they can continue and complete the work.* By this it only confirms that the PO for the contractor was only regarding the harness wire and issues that were related to it as per stated in the tax invoice issued by the contractor.

COC: Rujuk jawapan kepada S15 COW-2, saya katakan bahawa PO yang anda sebut tidak kena-mengena dengan kerja yang anda ditugaskan.

COW-2: Setuju

[50] On the issue pertaining to the Claimant confirming the work/job sheet/card, when being cross-examined, *COW-2 agreed that the Claimant had only confirmed work that was carried out by COW-2 and Aziz and not the contractor.*

COC: Ms 18, COB, saya katakan ini job sheet tarikh yang disenaraikan untuk job sheet adalah tugasan anda sebagai pekerja PTP dan disahkan oleh YM yang di assign sebagai penyelia bagi PM380.

COW-2: Setuju

[51] The company had not produced any evidence to show that the Claimant had played a part in causing the Company to make the payment to the contractor. In fact, at the DI, the Chairman of the DI had particularly asked the following question:

[52] By the above evidence, it is clear that the Claimant was not involved in processing or releasing the payment to the contractor. The 1st witness at the DI, Encik Zafrul Hisham (W1) had also stated that without the production of the WCR, payments cannot be made to the contractor. During the DI, there was an evidence given that the WCR never existed for this contractor, as such, how was payment released to the contractor?

[53] *The company had failed to produce to the court any evidence with regard to the WCR and or evidencing linking the Claimant to the WCR in order to show that the Claimant has been responsible for the release of payment to the contractor. Neither was there any evidence produced in court to show that the Claimant had been responsible in any way to cause the Company to release payment to the contractor.*

Decision

[54] Based on the foregoing it is the court's opinion that the Company had failed to produce any evidence to prove on a balance of probabilities the charge framed against the Claimant. The court is also of the opinion that the findings of the DI had correct and concur with the findings of the DI panel wherein the following was stated:

[55] Therefore, in making a decision, nearing a mind s. 30(5) of IRA, 1967 to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, this court finds that the Claimant's dismissal by the Company was without just cause or excuse.

(emphasis added)

The Issues In This Application

[31] (i) Whether a company may terminate an employee notwithstanding he was found not guilty by the domestic inquiry;

(ii) Whether the *audi partem* rule is applicable in the termination of an employment agreement without any termination benefit;

(iii) Whether an employee is guilty of an act which he opposed.

[32] I shall deal with the issues accordingly.

(i) Whether A Company May Terminate An Employee Notwithstanding He Was Found Not Guilty By The Domestic Inquiry

(ii) Whether The Audi Partem Rule Is Applicable In The Termination Of An Employment Agreement Without Any Termination Benefit

[33] It is not in dispute that the second respondent was summoned to attend a domestic inquiry (DI) and was found to be NOT guilty by the DI. (encl. 13; affidavit-in-reply by the second respondent, exhs. "F" and "G")

[34] Notwithstanding that, the management found that he was guilty and terminated his employment.

[35] Section 14 of the Employment Act 1955 (Revised 1981) (Act 265) clearly states as follows:

(i) An employer may, **on the grounds of misconduct** inconsistent with the fulfilment of the express or implied conditions of his service, **after due inquiry**:

(a) dismiss without notice the employee;

A (b) downgrade the employee; or

(c) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks.

(emphasis added)

B **[36]** It is the view of this court that the punishments which are:

(i) dismiss without notice the employee;

(ii) downgrade the employee; or

C (iii) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks

can only be meted out against an employee after due inquiry which in most cases, is called domestic inquiry and a finding of misconduct.

D **[37]** The management may choose to give an admonishment or a stern warning or record the misconduct (if any) in the service records but shall not impose a harsher punishment than is provided by s. 14 Employment Act 1955.

E **[38]** A domestic inquiry, in the context of human resource management, is a search for truth, facts, or circumstances concerning charges alleged by the employer against its employee. It is an inquiry created by the management against its own employee against who allegedly committed certain acts of misconduct. The process begins after the issuance of the so-called "show cause" letter to the employee accused of committing the infraction. Once the response to the letter was deemed unsatisfactory, the domestic inquiry can then commence.

[39] Objectivity must be guaranteed in the inquiry and this is demonstrated in the way the employee is allowed full opportunity to present his case, including the evidence to support his arguments. In addition, the process is also recorded while the investigating officers must not be related to the incident or the individuals involved.

[40] It is important to note that the domestic inquiry does not pass judgment or mete out punishment since it is merely a fact-finding exercise.

H **[41]** Furthermore, its findings can also be questioned by the employee on all grounds available to him in law and on facts. On the other hand, the management can defend its action later on by citing that a proper domestic inquiry was conducted.

I **[42]** Domestic inquiry is the application of the *audi partem* rule which is more commonly known by the maxim "*audi alteram partem*".

Audi alteram partem (or *audiatur et altera pars*) is a Latin phrase meaning "listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

"*Audi*" in the singular imperative form of "*audire*" – "to listen" – in Latin.

[43] "*Audi alteram partem* " is considered to be a principle of fundamental justice or equity or the principle of natural justice in most legal systems. This principle includes the rights of a party or his lawyers to confront the witnesses against him, to have a fair opportunity to challenge the evidence presented by the other party, to summon one's own witnesses and to present evidence, and to have counsel, if necessary at public expense, in order to make one's case properly.

[44] Failure to hold due inquiry renders any decision against the employee null and void. However, if it for the employee, then there is no condemnation or punishment. Even if there is a partial disadvantage against the employee, this rule must be strictly observed.

[45] This court is fortified in this belief by the authority of the Federal Court in *Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646, where the appellant was employed by the respondent ('the employer') as a wort cooler operator at its brewery in Kuala Lumpur, and was a workman under the Employment Act 1955 ('the Act'). The employer alleged that the appellant had committed attempted theft within the premises of the brewery, and so held a domestic inquiry to enquire into the alleged misconduct. The inquiry panel found the appellant guilty of four charges, including attempted theft, and recommended dismissal forthwith. The recommendation was acted upon by the brewery manager and the appellant, as a result, was dismissed from service.

[46] The appellant took a writ action against the employer claiming that the dismissal was in breach of the rules of natural justice. It was not in dispute that both the inquiry panel and the brewery manager, in recommending the dismissal and dismissing the appellant respectively, had not heard any mitigation on the part of the appellant. This being the case, the appellant contended that the dismissal was void as the requirement of "due inquiry" in s. 14(1) of the Act had not been complied with. The learned judge held that the employer had done all that was necessary to ensure a fair hearing at the inquiry, and so there was no breach of the principles of natural justice. The appellant appealed, and before the Supreme Court the primary question that arose was whether a contractual servant who is an "employee" within the meaning of the Employment Act 1955, would be entitled to have his dismissal declared null, void and of no effect, if procedural safeguards provided by the law have not been observed at a pre-dismissal inquiry at the domestic level. It was held that, *inter alia*:

A Broadly stated, before us, the dominant question of law which arises for decision in this appeal is whether a contractual servant who is an 'employee' within the meaning of the Employment Act 1955, would be entitled to have his dismissal declared null, void and of no effect, if procedural safeguards provided by the law have not been observed at a pre-dismissal inquiry at the domestic level?

B *Speaking generally, where the relationship is that of master and servant, we are normally in the field of the Common Law of contract, and so, the principles of administrative law, which, of course, must include the fundamental rule of natural justice expressed in the Latin maxim audi alteram partem (hear the other side) would not apply. On the other hand, where the employment is in the public sector, or where*
C *statutory or other protection is conferred, procedural safeguards will have to be observed.*

And, so far as remedies are concerned, at Common Law, in an ordinary master and servant relationship, where wrongful dismissal is established, relief will not be by way of an order for reinstatement but by way of an award of damages.

D (emphasis added)

[47] In *Ridge v. Baldwin* [1964] AC 40, the Chief Constable, Brighton, Ridge had been tried for conspiring to corrupt the course of justice but was acquitted. Thereafter, arising out of certain derogatory remarks passed by the trial judge against Ridge, when acquitting after a lengthy trial, the watch
E committee acting under s. 191(4) of the Municipal Corporations Act 1882, which empowered them to dismiss any constable "whom they think negligent in the exercise of their duty", from his office. Ridge was not present at their meeting nor was he given notice of the proposal to dismiss him, particulars of the grounds on which it was based, or an opportunity of stating
F his case.

[48] The Court of Appeal, relying on the Privy Council case of *Nakkuda Ali v. Jayaratne* [1951] AC 66 held that the committee was only acting in an administrative capacity, but on further appeal to the House of Lords, their Lordships of the House disagreed. Their Lordships of the House concluded
G that as the committee had not observed the rules of natural justice, its decision was void.

In referring to the right to be heard before being dismissed, Lord Reid distinguished three types of cases; namely,

H (i) dismissal of a servant by his master,

(ii) dismissal from an office held during pleasure and

(iii) dismissal from an office where there must be something against a man to warrant a dismissal.

I So far as (i) was concerned, Lord Reid said:

The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the

contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract.

So the question in a pure case of master and servant does not all depend on whether the master has heard the servant in his own defence: *it depends on whether the facts emerging at the trial prove breach of contract.*

But then he added: "But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants or the grounds on which it can dismiss them.

So far as (ii) is concerned, to say that an office is held during pleasure means that the person empowered to dismiss need not have anything against the officer, so he need not give any reason.

Lord Reid concluded that *RIDGE*'s case, did not come within (i), as a chief constable is not the servant of anyone, nor, for that matter did it fall within (ii) as the statute only permitted the Watch Committee to remove him only on the ground of negligence or unfitness. In the result, *Ridge*'s case came within (iii), and in such cases Lord Reid said: "I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation."

(emphasis added)

[49] In *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578, Malloch, a school teacher had been dismissed from his job, without having been given a hearing. The House of Lords held that if Malloch's status had been governed solely by common law instead of one holding public office during pleasure (Lord Reid's second classification in *Ridge v. Baldwin*), he would not have been entitled to a hearing. However, by a statute of 1882, it was provided that no resolution for the dismissal of such a teacher was to be valid unless notice of motion for his dismissal had been sent to the teacher not less than three weeks before the meeting, and unless the resolution to dismiss had been agreed to by a majority of all the members of the body concerned. The legal position of Malloch was that his common law position was thus "fortified by statute" and that it was implicit in that provision, that he was entitled to be heard. His dismissal was quashed.

[50] Lord Reid made the observation that an elected public body is in a very different position from that of a private employer. He pointed out that although many of its servants in the lower grade are in the same position as servants of a private employer, "many in higher grades or 'offices' are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and where a statutory form of protection would be less effective if it did not carry with it the right to be heard, I would not find it difficult to imply this right."

[51] Lord Wilberforce while recognising that the principle that a person holding office at pleasure has no right to be heard, was not to be whittled down, added that the right to be heard is so important that that principle should not prevent the courts from examining the framework of the employment to see whether that right existed.

[52] Indeed, Lord Wilberforce pointed out that even a contractual servant may challenge his dismissal if statutory safeguards are not observed. He said he would not follow *Vidyodaya University Of Ceylon v. Silva* [1964] 3 All ER 865, (where the court did not intervene in the dismissal of a professor), insofar as it involved a denial of any remedies of administrative law to analogous employments. His Lordship observed (at p. 1595 G to H):

> *A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of the rules of natural justice, according to the master and servant test, looks illogical and even bizarre. A specialist surgeon is denied protection which is given to a hospital doctor; a university professor, as a servant has been denied the right to be heard, a dock labourer and an undergraduate have been granted it: examples can be multiplied.*
>
> (emphasis added)

Further down in the learned judgment:

> *As regards protection against dismissal, office holders and occupants of statutory positions have greater security of tenure, firstly, because the law implies a right to natural justice, and secondly, because a declaration might issue that the dismissal was void*. (See, e.g. *Ridge v. Baldwin* [1964] AC 40; *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578; *Chief Constable Of North Wales v. Evans* [1983] 1 WLR 141). *Most importantly, in considering the question whether there is a right to a hearing, the crucial question is whether a statutory or other requirement provides or is to be interpreted as providing the elementary safeguard of the right to a hearing*. (See, e.g. *Stevenson v. United Road Transport Union* [1977] 2 All ER 941 CA; *Yates v. Lancashire County Council* [1974] 10 ITR 20 EAT (Police); *Breen v. Amalgamated Engineering Union* [1971] 2 QB 175 (Trade Union Office Holder) 102 *Social Club & Institute Ltd. v. Bickerton* [1977] ICR 911 (club)).
>
> *A further consideration as regards the question of the right to a hearing under the rules of natural justice or fairness is to be found in the law of unfair dismissal introduced by the Industrial Relations Act 1967. A workman within the Act who has been dismissed may commence proceedings thereunder for the purpose of establishing that he has been unfairly dismissed. In such proceedings, the onus will be on an employer to prove that the dismissal was in all the circumstances reasonable*.
>
> *The reasonableness of the dismissal may well depend on the procedure followed*. In this context, it is pertinent to point out that art. 42 of the Code of Conduct of Industrial Harmony ('the Code') jointly agreed upon on 9 February 1975, by the Malaysian Council of Employers' Organisation and the Malaysian Trades Union Congress with the approval of the Minister for Labour and manpower, provides, *inter alia*, for pre-dismissal inquiry with the right to be informed in writing of the misconduct alleged, an

opportunity given to the employee to state his case, the right to be represented by his workers' representative or trade union official and where appropriate, a right of appeal.

The resemblance between the requirements of art. 42 and the requirements of natural justice is striking. It is noteworthy that s. 30(5A) of the Industrial Relations Act 1967, authorises the Industrial Court, in making an award, to take into consideration, the requirements of the Code. However, these requirements are not absolute and so there will be cases where it is clear that there would be no point in observing the pre-dismissal procedure. On the other hand, the case of *Khanum v. Mid Glamorgan Area Health Authority* [1970] ICR 911 EAT (club) shows that where the employer has observed an agreed disciplinary procedure it will be difficult to hold that the dismissal was procedurally unfair.

To return to the submission of Counsel for the Employee before us; he relied heavily on the provisions of s. 14(1) of the Employment Act 1955 ('the Act') which says this:

> 14(1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry:
>
> (a) dismiss without notice the employee;
>
> (b) downgrade the employee; or
>
> (c) impose any other lesser punishment as he deems just and fit

As we have already indicated, in the present case, it was common ground that a domestic inquiry had been held, but Counsel stressed that there could be no "due inquiry" within the meaning of s. 14, when, as here, the Employee, a workman within that Act, had been denied the opportunity of addressing in mitigation.

We accept that this was a master and servant relationship case, but as we have already remarked, the crucial question is whether a statutory or other requirement provides or can be interpreted as providing the elementary safeguard of the right to a hearing. As Lord Wilberforce in the case of *Malloch* (*ibid* at p. 1595 H to 1596 A) rightly said:

> *One may accept that if there are relationships in which all requirements of the observance of natural justice are excluded (and I do not wish to assume that this is inevitably so), these cases must be confined to what have been called pure master and servant cases, which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection*.

If any of these elements exist then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential requirements to be observed and failure to observe them may result in a dismissal being declared void.

(emphasis added)

[53] In *R v. BBC, Ex Parte Lavelle* [1982] 1 RLR 404, Justice Woolf indicated, *albeit obiter*, that when there is a procedure for dismissal in an employment not covered by statute at all, employers must comply with that procedure for the dismissal to be valid. If the contractual procedure was infringed, an injunction should issue to prevent the dismissal. This view was partly based on the notion that employment protection legislation had substantially changed the position at common law, so that 'the ordinary contract between master and servant now has many of the attributes of an office.'

[54] Further in *Said Dharmalingam Abdullah v. Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 CLJ 646, it is explained, *inter alia*:

> In the present case, there is a statutory requirement, *to wit*, s. 14(1) of the Act, providing for the elementary safeguard of the right to "due inquiry" by the Employer. It follows, that at least, *prima facie*, a dismissal in breach of s. 14(1) would be void.
>
> We are aware of the Supreme Court decision in *Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Anor* [1988] 1 MLJ 111 which held that failure by an employer to hold a pre-dismissal Inquiry could be cured by the hearing before the Industrial Court.
>
> Two points are significant in the *Dreamland* case: *first, the court was considering the case of a workman who was in receipt of income of more than RM1,250 per month and, therefore, not employee within the meaning of the Act; secondly, Counsel on both sides had stood on common ground that the dismissal was justified*. The only issues for decision were jurisdictional: (1) did the Industrial Court have jurisdiction to award compensation to a workman whose dismissal had been upheld by the court? and (2) did the Industrial Court have jurisdiction to amend the date of dismissal so that the workman was deemed to be in the employment until the date of the award and thereby become entitled to backwages?
>
> It follows that *Dreamland* was a case where it was **not** open to the workman to rely on a statutory or other requirement which provided or could be interpreted as providing the elementary safeguard of the right to a hearing. *Dreamland* is, therefore, readily distinguishable on the facts from the present case.
>
> Similarly, the Supreme Court decision in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd.* [1995] 3 CLJ 344 which endorsed *Dreamland*, also concerned an employee in receipt of an income of more than RM1,250 per month and, therefore, not an employee within the meaning of the Act. It was thus not open to him to rely upon the statutory right to a pre-dismissal hearing. *Hong Leong* is, therefore, also readily distinguishable on the facts, from the present case.
>
> We note, in passing, the interesting and well researched article by Mr. V. Anantaraman entitled "*Procedural Fairness in Dismissal Proceedings in Malaysia*" [1996] 2 MLJ cxiii wherein he concludes that "*the decisions of the apex courts both in Dreamland and Hong Leong Assurance notwithstanding - it may*

not be far wrong to conclude that the case law governing procedural rectitude in dismissal for misconduct is in a state of flux in Malaysia."

Having said that, we must add, that when, as here, a claimant is an employee within the meaning of the Act, he has by s. 14(1) thereof, a statutory right to "due Inquiry" by his employer, and so, the approach of the Industrial Court or for that matter the High Court, in considering the question whether the claimant had been dismissed without just cause or excuse, would be, to examine the decision not just for substance but for process as well.

(emphasis added)

In essence, the Supreme Court ruled that due inquiry is compulsory.

[55] There is, however, a clear distinction between a person serving an office during pleasure and another who served under a contract of service. In the former, borrowing the words of Lord Reid in *Ridge*'s case "an office is held during pleasure means that the person empowered to dismiss need not have anything against the officer, so he need not give any reason ..." but in the latter, the terms of his contract and the employment law (for the time being in force) applies and here, for dismissal from work, two conditions must be fulfilled, namely:

(i) due inquiry be done and

(ii) a finding of misconduct inconsistent with the fulfilment of the express or implied conditions of his service.

[56] Mere misconduct is insufficient. It must be misconduct inconsistent with the fulfilment of the express or implied conditions of his service.

[57] The question that begs our answer is, whether an inquiry which was held and has made a finding of not guilty may be disregarded by the management who substitute its own decision to dismiss the employee.

If that is so, what sort of protection does "due inquiry" afford an employee?

[58] In my mind, a procedural "due inquiry" (followed to the letter in all its procedures) but later disregarded in the decision of the management is not "due inquiry" at all. It is a kangaroo procedure worthy of a kangaroo court. It is malicious in its intent and makes a mockery of "*audi alteram partem*".

[59] At the risk of being repetitive, s. 14 Employment Act 1955 is only applicable where there is (i) A due inquiry and (ii) A finding of misconduct inconsistent with the fulfilment of the express or implied conditions of his service.

[60] This, the applicant failed to ensure, full compliance with s. 14.

[61] This was what Lord Reid found in *Ridge v. Baldwin* that "The right of a man to be heard in his own defence is the most elementary protection of all and where a statutory form of protection would be less effective if it did not carry with it the right to be heard, I would not find it difficult to imply this right ..." which was cited with approval by the Federal Court in *Said Dharmalingam Abdullah* (*supra*)

[62] A domestic inquiry may help employers determine whether misconduct was committed, in order to allow employees to properly defend themselves, employers can hold a domestic inquiry which will help them decide whether the misconduct was committed and what sort of punishment should be meted out.

[63] An employee accused of misconduct gets his day in "court" *via* a domestic inquiry, whereby the employer has to prove the charges and the worker gets to defend himself.

[64] If there is no misconduct, then the employee must be restored to his former position (if he was removed) and paid any income due (which may have been withheld pending the domestic inquiry) and this is for the entire period when he was deprived part of the whole of his lawful income.

[65] This is because a dismissal pursuant to s. 14 Employment Act is illegal, null and void if the requirements of the provision of the law are not complied with. As it is illegal, the doctrine of *ex turpi causa non oritur* applies.

[66] In our case, it is pleaded and properly argued. This court takes cognisance that it was brought to the forefront for the applicant to answer.

[67] In *Tinsley v. Milligan* [1993] 3 WLR 126 House of Lords was faced with the fact that the claimant and defendant were lovers. Together they purchased a property from which they jointly ran a business by letting out the rooms in the house. It was agreed that the house was to be registered in the name of the claimant alone. This was so that the defendant would be able to fraudulently claim social security benefits which would go into their joint bank account. The relationship broke down and the claimant sought possession of the house asserting full ownership. The defendant sought a declaration that the property was held on trust for both of them in equal shares. The Court of Appeal applied the public conscience test and held that it would be an affront to the public conscience to allow the claimant to keep the whole interest in the house. The claimant appealed to the Lords.

[68] The House of Lords rejected the public conscience test as it was inconsistent with previous authorities and gave too much discretion to the court. They applied the reliance principle; the defendant did not have to plead the illegality to succeed, it was sufficient that she had contributed to the purchase price and there was a common understanding that they would own the house equally.

Lord Browne-Wilkinson has this to say, *inter alia*:

> **the consequences of being a party to an illegal transaction cannot depend … on such an imponderable factor as the extent to which the public conscience would be affronted by recognising rights created by illegal transactions**.
>
> (emphasis added)

Lord Goff opined, *inter alia*:

> *There is no trace of any such principle forming part of the decisions in any of the cases in question. It follows that in my opinion, on the authorities, it was not open to the majority of the Court of Appeal to dismiss the appellant's claim on the basis of the public conscience test invoked by Nicholls LJ.*
>
> (emphasis added)

[69] If the defence put up by an employee has been accepted by the domestic inquiry, but disregarded by the management, then there should not be any domestic inquiry and s. 14 Employment Act has been defeated by injustice and becomes devoid of meaning.

[70] Section 14 of the Employment Act 1955 provides that "(1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, …"

[71] A plain reading of s. 14(1) requires the following before a termination without compensation be allowed, "on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, …" In other words, the operative phrase is "misconduct inconsistent with the fulfilment of the express or implied conditions of his service, …" If there is no misconduct, then s. 14 is inapplicable.

[72] How is the Industrial Court or any court for that matter to know of misconduct except for a trial. For the purpose of the Employment Act 1955, the trial is the due inquiry, done in the manner by what we commonly known as "domestic inquiry".

[73] If the management refuses to accept the findings of the domestic inquiry set up by the management itself, it is in clear violation of the s. 14 for finding the guilt of misconduct or otherwise is vested in the domestic inquiry, the moment it was formed and held.

[74] The management does not take over this job which has been expressly provided for by the Employment Act 1955.

[75] It is the ruling of this court, if the domestic inquiry found the employee not guilty and hence there is no misconduct, he may not be terminated by way of s. 14 Employment Act. The management cannot substitute its own opinion in place of the facts that were found by the domestic inquiry.

[76] On the other hand, should the domestic inquiry, after making a finding that the employee was indeed guilty of misconduct, does not and has no jurisdiction to decide on the punishment to be meted out to the employee as that would be within the domain of the management.

[77] However, there is nothing to stop termination by way of other provisions such as compensation *in lieu* of the required notice etc which is the domain of the management but full compliance of both the employment contract as well the statutory law, as in this case, the Employment Act 1955.

(iii) Whether An Employee Is Guilty Of An Act Which He Opposed

[78] It is undisputed that the second respondent opposed the purchase order. This is found in encl. 3, exh. A-2 p. 54 where the second respondent wrote on report/progress worksheet "please cancel PO wiring electrical to the contractor".

[79] In all the reports/progress worksheets (pp. 48 to 54) which were six reports that were submitted to the management, the second respondent clearly wrote "wiring system job not complete under by the contractor".

[80] We excuse the poor command of English but the message is clear.

[81] The second respondent has done his job. It is for the management of the company (either the finance or accounts department to do theirs).

[82] To punish means "inflict a penalty or sanction on (someone) as retribution for an offence, especially a transgression of a legal or moral code."

[83] It may be extended to violations of standing orders or policy of employers.

[84] How the second respondent could be punished when he is clearly about not supporting the payment to the contractor. It is repulsive to say the least. If anyone is to be blamed, it is the payment department that has failed to perform its duty.

[85] The common law rule applicable in such straightforward cases was stated by Lord Morris in *University Council Of Vidyodaya University Of Ceylon v. Silva* [1965] 1 WLR 77 at p. 79:

> *... If the Master rightfully ends the contract there can be no complaint; if the master wrongfully ends the contract then the servant can pursue a claim for damages ... In a straightforward case where a master employs a servant the latter is not regarded as the holder of an office and if the contract is terminated there are ordinarily no questions affecting status or involving property rights.*
>
> (emphasis added)

[86] The applicant failed to comply with s. 14 when it invokes the provision in dismissing the second respondent.

[87] It is my considered view that the second respondent is not guilty of breaking any rules. The learned Chairman of the Industrial Court thinks so. I find no reason to depart from her views.

Conclusion

[88] I have perused over the cause papers, the written submissions and the grounds for the award by the learned Chairman as well as hear the oral submissions of parties. I find no error in her findings.

[89] For the reason aforesaid, I dismiss this application with cost.